IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

BAD DATE, THE 0TH *BAD DATE* 0 /

MFA.No. 1351 of 1999()

AGAINST THE JUDGEMENT IN C.C.NO.380/96 IN CP.3/1992 Dated 01/06/1999

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APPELLANT/ADDL 10TH RESPONDENT:

MINU, MINU NILAYAM,
PONNOOKARA DESOM,
PUTHOOR VILLAGE,
THRISSUR DISTRICT.

BY ADV. SRI.K.GOPALAKRISHNA KURUP

RESPONDENTS/CLAIMANT/RESPONDENTS 3 AND ADDL.RESPONDENTS 4 TO 9 AND 11.

1. M/S.HOLY FAMILY CHITTIES L& LOANS (p) LTD.,
(IN LIQUN.) REPRESENTED BY OFFICIAL LIQUIDATOR,
HIGH COURT OF KERALA, ERNAKULAM.

2. K.K.SAKTHIDHARAN, S/O.KUNJIKUTTAN,N MELOOR VILLAGE,
AND DESOM, MUKUNDAPURAM TALUK. **(REMOVED)**.

3. T.D.SANTHAMMA, W/O.LATE K.K.PODIYAN, ALA VADAKKUMURIYIL,
THEKKEKEEPATHU VEETTIL, ALA VILLAGE AND DESOM,
CHENGANNUR.

4. JAYARANAN, P., S/O.LATE PODIYAN, AL-HASSA,
P.B.NO.1610, K.S.A. PIN. 31982.**(DELETED)**.

5. SUJATHA, D/O.LATE K.K.PODIYAN, ALA VADAKKUMMURIYIL,
THEKKEKEEPATHUVEETTIL, ALA VILLAGE & DESOM, CHENGANNUR.

6. USHA,D/O,LATE PODIYAN, -DO- -DO-

7. BIJU P., S/O.LATE K.K.PODIYAN, D.NO.1/64,
THEKKEKEEPATHU HOUSE,L ALUVA (PO), CHENGANNUR.

8. MRS.CHELLAMMA,W/O.LATE C.C.JOSE, MINU NILAYAM, PONNOOKKARA DESOM, PUTHUR VILLAGE, THRISSUR DIST.

9. MANASSY, D/O. SRI C.C.JOSE, MINU NILAYAM, -DO- -DO-

(2ND RESPONDENT IS REMOVED FROM THE PARTY ARRAY AS PER ORDER DATED 10/2/2005 ON I.A.485/05)

(4TH RESPONDENT IS DELETED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANT AS PER ORDER DTD. 6/2/07 ON IA.NO.241/07)

ADV. SRI.K.MONI

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 16/03/2007,ALONG WITH MFA NO.1176 OF 1998 THE COURT ON DELIVERED THE FOLLOWING:

P.R.RAMAN & ANTONY DOMINIC,JJ.

M.F.A.NOS.1351 OF 1999 &
1176 of 1998

Dated this the day of May, 2007

JUDGMENT

Raman,J.

The issue that arises for consideration in these appeals is regarding the period of limitation applicable in the case of claim petition preferred by the Official Liquidator on behalf of the Company in liquidation and whether on the factual situation available in the case the claim is barred or not. As respect the legal issue is concerned, we shall refer to the facts stated in M.F.A.No.1351/99. That is a case where the appellant was the additional 10th respondent in Company Case No.380/96. The Official Liquidator on behalf of M/s.Holly Family Chitties & Loans (P) Ltd. (in Liquidation) filed the claim as C.C.No.380/96 for realisation of an amount of Rs.9,311.18ps. made up of Rs.8,014/- as principal amount (Rs.3,600 + notice charge of Rs.75 and Rs.4339 and interest thereon at 12% from 15/5/1986 to 31/5/1996) and an amount of Rs.1,297/- as interest on the said principal amount of Rs.3,600/- at 12% per annum from 1/6/96 to the date of decree with future interest on the said principal amount at 6% per annum from the date of decree till realisation. After setting off an amount of Rs.3,763/- the

decree was eventually passed as prayed for. The main contention on behalf of the appellant was that the claim is barred by limitation. The learned Single Judge, following the decision of the Full Bench of this Court in **Ulahannan v. Wandoor Jupiter Chits (P) Ltd. (`1988 (2) KLT 636),** held that since there is no extinguishment of the liability by any of the provisions of the Limitation Act and Section 458A of the Companies Act in substance and effect provides for an extension of period of limitation prescribed under the Limitation Act for suits and claims falling under that section, there is an extension of the period of limitation and to that extent a revival of the remedy which would have been otherwise lost under the law of limitation. But in this case the subscriber died subsequently and the appellant was impleaded as additional respondent among other legal heirs. Kuri terminated on 4/2/1991 and the order of winding up was made on 15/7/1992. Hence, it was held that the claim would be in time unless it is possible to say that on the dafault of the 52nd instalment by the lst respondent, time starts to run and it stood expired long before the commencement of the winding up. The 52nd instalment fall due on 4/3/86. It was observed that according to the kuri security bond executed by the subscriber,, the Company no doubt had the

right to demand the repayment of the entire future subscriptions on a default being made by the subscriber. But placing reliance on the decision of this Court in **P.T.Kuriakose v. K.C.Cherian (1984 KLT 744)** it was held that consolidated payment becomes due only on the making of a written demand in terms of a relevant enactment and the right to recover is only of the instalment that have fallen due otherwise. There is no case that the right to demand the entire future subscriptions in terms of the bond was exercised by the Company in liquidation. It was also held that the time for recovery of the entire balance amounts commenced to run from 4/8/96 only. Referring to the contention on behalf of the appellant that the time started to run for recovery of the defaulted instalments as and when they become due and such of those instalments which are beyond three years or the commencement of the winding up should be held to be barred by limitation. The learned Single Judge held that the question whether the Foreman is obliged to sue for each of the defaulted instalments as and when they fall due or is entitled to wait and sue for recovery of the entire amount due from the defaulted subscriber, after the kuri terminates, will have to be decided on the basis of the agreement between the parties. In the absence of any materials produced to show that there was any provision in the kuri agreement between the parties that the

Foreman was obliged to sue for recovery of each defaulted instalments as and when it fell due, the contention was repelled. In view of the decision of the Full Bench of this Court in **Ulahannan's case (1988 (2) KLT 636)** there cannot be any doubt that the amounts, which were not barred as on the date of commencement of the winding up, could be recovered within a period of three years from the date of completion of one year after the date of winding up order, because as per Section 458A of the Companies Act, while computing the period of limitation prescribed for any suit or application in the name of the Company, which is being wound up, the period from the date of commencement of the winding up to the date on which the winding up order is made and a period of one year immediately following the date of the winding up order shall be excluded. Because cause of action arose in the hands of the Official Liquidator only on the passing of the winding up order, it was held that a fresh period of limitation is available after the winding up order. It was held by the Apex Court in **Karnataka Steel & Wire Products and others v. Kohinoor Rolling Shutters & Engg. Works and others ((2003) 1 SCC 76)** that by no stretch of imagination, the provisions contained in Section 458-A can be construed to mean that even a barred debt or a claim which was not

enforceable on the date of the winding up, would stand revived, once a winding up application is filed and order is made by virtue of Section 458A. Therefore, the question arises as to whether any part of the amount claimed by the Official Liquidator became barred as on the date of commencement of the winding up proceedings. If so, such barred debt cannot be revived by applying the provisions contained in Section 458A. In this case the definite contention of the appellant was that the amount of 52nd instalment was paid and thereafter, the subscriber committed default. Each instalment will got barred on the expiry of the three years period, unless there is any provision in the variola (Chit Bye-laws) applicable to the Chitty enabling the creditor-Company to wait till the last instalment becomes due so as to recover the entire amount in lumpsum. In this case we are not concerned with the future instalments and as to whether the said amount could not be recovered or not. As regards the future instalments are concerned, they will become barred on the expiry of three years period from the due date of such instalment. Applying the same if any of the instalments have already become barred, in the absence of any enabling provision, it will be barred by law of limitation on the expiry of three years. The burden to show that even the instalments, which were defaulted, can still be reserved to be recovered along with the last

instalment lies on the person, who pleads an exemption ordinarily that the amount due as per the instalment will become barred on the expiry of three years from the due date. This burden being on the person, namely, the Official Liquidator, who pleads an exemption and in the absence of any materials placed, it has to be held that those instalments, which became barred as on the date of commencement of the winding up, cannot revive merely for the reason that the company was in liquidation. As already held by the Apex Court, such barred debts cannot be recovered by virtue of placing reliance on any provisions contained in Section 458 A of the Companies Act. In the circumstances, we hold that the instalments which became barred as on the date of commencement of the winding up procdeedings, cannot be recovered. In the absence of any bifurcated figures, the matter is remanded to the learned Single for fresh consideration as to what is the amount actually became barred on the date of winding up proceeding and on such finding the said amount will not be entitled to be recovered and only the balance amount could be recovered. The judgment and decree passed by the learned Single Judge is set aside to the above extent and the matter is remanded to the Single Bench for fresh consideration in accordance with law.

2. Coming to the facts of other appeal, M.F.A.No.1176/1998 the

learned Single Judge himself has granted the benefit of exclusion of the barred debt and only the instalment fell due on l5/4/1989 onwards, in respect of which a decree is passed. The appellant contends that the entire claim is to be held as barred by limitation. According to the appellant, the entire amount including future instalments will become barred as once a default is committed, the entire amount in lump could be recovered. By vurtue of the conditions of chitty, which is contractual in nature, it is for the appellant firstly to establish that the entire amount including the future instalments will become due and payable, once a default is committed and secondly he has further to show that the demand in writing was made by the creditor exercising such right, in the absence of which it cannot be held that regarding the future instalments also, the debt becomes barred. In this connection we may refer to a Bench decision of this Court in **P.J.Kuriakose v. K.C.Cherian (1984 KLT 744).** The question was whether the Chitty bond providing right to recover full amount in lump, in case any future instalment is defaulted, what will be the starting point for period of limitation and whether instalments which fell due beyond three years prior to the date of suit, is barred. It was held that though it is stipulated in the bond that the Foreman is entitled to claim all the future subscriptions, when the prized subscriber commits default of

payment of any instalment, the statute intervenes and makes it obligatory on the Foreman to exercise that right stipulated in the security bond only after making a demand in writing. It was also held that the consolidated payment becomes due only on the making of a written demand. The contention of the appellant is that the Travancore Chitty Act has no application and therefore the intervening effect of the provision is not relevant in this context.

3. In the counter affidavit filed by the Official Liquidator, it is specifically averred that the cause of action arose only when the kuri terminated, i.e. on 16/12/1990, whereas the winding up proceedings was commenced from 9/3/1992 and the winding up order was passed on 15/7/1992. It is also averred that the 90th to 111th instalments were due in the 5th day monthly kuri at Rs.200/- each, which fell within the period and they are not barred by limitation. In paragraph 23 of the judgment impugned in the appeal it was observed that the question to be considered is whether the claimant is entitled to recover the instalments which fell due within the period of three years of the institution of the winding up procedings, though the chitty bond provides a right to recover the entire amount in lump, in case of default in payment of any one or more future instalments and claim is preferred claiming the entire amount from the

date of default. The stand of the Official Liquidator is that though there is a provision in the chitty agreement executed by the respondents in these cases providing right to the claimant to claim the entire balance amount in deafult of payment of two successive instalments, the claimant has not exercised that right of option to claim the entire amount as provided under Section 32 of the Tranvancore Chitties Act and Section 33 of the Chit Funds Act, 1982 and hence the claimant is entitled to the instalments which are not barred by time on the date of commencement of the winding up proceedings, though they are not entitled to some of the instalments so claimed which are barred by limitation before the commencement of the earlier winding up proceedings. This Court after referring to the decision in **Kuriakose's case (1984 KLT 744)** held that the plaintiff was entitled to a decree for the instalments which fell due after 4/6/1974, within three years prior to the date of suit and not the instalments prior to that date.

4. In the decision in **Jess Ralph v. Modern Savings (1986 KLT 434)** a Single Judge of this Court, after considering several decisions of this Court, other High Courts and the Privy Council, held that since the Forman has not enforced the default clause in the chitty agreement, the entire amount did not fall due immediately when the default was

committed and therefore, all the amounts which fell due within three years of the suit can be claimed either under Article 113, the residuary article or even under Article 36 of the Limitation Act treating the chitty bond as an ordinary instalment bond or not. It was contended that on behalf of the appellant that the chitty company involved in this case was registered and the kuri was conducted in the Karnataka State and the chitty was commenced before the enforcement of the Chit Funds Act, 1982 in Karnataka State on 1/1/1985 and therefore no question of sending notice under Section 33 of the Chit Funds Act. But the learned Single Judge found that apart from the said arguments advanced by the counsel for the respondents, there is nothing on record to show that the chitty company was registered and the kuri was conducted in Karnataka State and either the provisions of Travancore Chitties Act or the Chit Funds Act enabling the Foreman to exercise his option to recover the entire balance instalments on default only by issuing a notice to the subscriber, are not applicable to the facts of the case. Thus it can be seen that the appellant was not able to substantiate his contention that the chitty was conducted in Karnataka State, which is a question of fact and in the absence of any materials produced on record, the conclusion reached by the learned Single Judge cannot be said to be faulted with. The appellant has already

been given the benefit of the limitation in respect of instalments, which already got barred as on the date of commencement of the proceedings. He is not entitled for any further relief in the matter.

Appeals are accordingly dismissed.

P.R.RAMAN,
Judge.

ANTONY DOMINIC,
Judge.

kcv.